UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
--X
TRACEY GIARDINI, CRAIG GIARDINI,
and CRAIGS CAR CARE CENTER,

Plaintiffs.

Adv. Proc. No. 15-08013-ast

v.

THE BANKRUPTCY ESTATE OF
CENTEREACH DEV. CORP.,
GULF OIL LIMITED PARTNERSHIP,
and CUMBERLAND FARMS, INC.,

Defendants.
--X

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the application (the "Application") of the Defendant, Robert L. Pryor, as the Chapter 7 Trustee (the "Trustee") of THE BANKRUPTCY ESTATE OF CENTEREACH DEV. CORP. , by and through his attorneys, Pryor & Mandelup, LLP by his attorneys, Pryor & Mandelup, L.L.P., a hearing will be held on August 2, 2016 at 9:30 A.M. (the "Hearing Date"), or as soon thereafter as counsel can be heard, before the Honorable Alan S. Trust, United States Bankruptcy Judge, at the United States Bankruptcy Court, Alfonse M. D'Amato Federal Courthouse, 290 Federal Plaza, Room 960, Central Islip, New York 11722 for the entry of an Order: (1) holding the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in contempt of court for failing to comply with an Order of the Bankruptcy Court entered on February 18, 2015 pursuant to Bankruptcy Rule 9020; (2) requesting sanctions against the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in light of their contempt of court, in the amount of two hundred fifty dollars ($250.00) per day for each day that they refuse to comply with the terms of the February 18 Order; (3) awarding to Pryor & Mandelup, LLP, as attorneys for the Defendant, legal fees in the sum of $2,500.00 for the drafting of the within Motion for Contempt and (4) granting such other and further relief as to this Court is just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to E.D.N.Y. LBR 9006-1(a), any objection or response (the "Objections") to the Application must be made in writing, must state the standing of the objectant, state with particularity the grounds for the objection, shall conform to the Federal Rules of Bankruptcy Procedure and Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court electronically in accordance with General Order 559. (General Order 559 and the User's Manual for the Electronic Case Filing System can be found at www.nyeb.uscourts.gov, the official Web-site of the Bankruptcy Court), by registered users of the Bankruptcy Court's case filing system and, by all other parties in interest, on a 3.5 inch diskette, CD or DVD preferably in Portable Document Format (PDF), Microsoft Word or any other Windows-based word-processing format (with a hard-copy delivered directly to the Chambers of Hon. Alan S. Trust, at the above address), and must be served in accordance with General Order 559 upon: (I) Pryor & Mandelup, L.L.P., Counsel to the Trustee, 675 Old Country Road, Westbury, NY 11590, Attn: Michael Farina, Esq., and (ii) the Office of the United States Trustee, 560 Federal Plaza, Central Islip, NY 11722, so as to be filed and actually received no later than July 26, 2016 at 5:00 p.m. on that day (the "Objection Date").

PLEASE TAKE FURTHER NOTICE, that if no objections are received by the Objection Date, the relief requested in the Application may be granted without a hearing.

Dated: Westbury, New York
July 7, 2016

PRYOR & MANDELUP, L.L.P.
Attorneys for Defendant, Robert L. Pryor, as the Chapter 7 Trustee

By: ***s/ Michael Farina***
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UNITED STATES BANKRUPTCY COURT
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THE BANKRUPTCY ESTATE OF
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GULF OIL LIMITED PARTNERSHIP,
and CUMBERLAND FARMS, INC.,

Defendants.
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APPLICATION IN SUPPORT OF MOTION

TO: THE HONORABLE ALAN S. TRUST,
UNITED STATES BANKRUPTCY JUDGE:

Defendant, Robert L. Pryor, as the Chapter 7 Trustee (the "Trustee" or "Defendant Trustee") of THE BANKRUPTCY ESTATE OF CENTEREACH DEV. CORP. , by and through his attorneys, Pryor & Mandelup, LLP, as and for his Application for the entry of an Order: (1) holding the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in contempt of court for failing to comply with an Order of the Bankruptcy Court entered on February 18, 2015 pursuant to Bankruptcy Rule 9020; (2) requesting sanctions against the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in light of their contempt of court, in the amount of two hundred fifty dollars ($250.00) per day for each day that they refuse to comply with the terms of the February 18 Order; (3) awarding to Pryor &

Mandelup, LLP, as attorneys for the Defendant, legal fees in the sum of $2,500.00 for the drafting of the within Motion for Contempt and (4) granting such other and further relief as to this Court is just and proper represents as follows:

1. On January 13, 2015 (the "Filing Date"), the Debtor, Centereach Development Corp. (the "Debtor") filed a voluntary petition for relief from its creditors under Chapter 7 of the Bankruptcy Reform Act of 1978, as amended (the "Bankruptcy Code").

2. The First Section 341 Meeting in this case was conducted on February 9, 2015, at which time Robert L. Pryor qualified as permanent Trustee pursuant to 11 U.S.C. §702(d).

3. By Order of the Bankruptcy Court entered on January 23, 2015, this case was jointly administered with the cases A & B MART & SERVICE, INC. Case No. : 15-70118-ast BOHEMIA DEVELOPMENT CORP. Case No. : 15-70119-ast, CORAM ASSOCIATES CORP. Case No.: 15-70121-ast HAUPPAUGE DEVELOPMENT CORP., Case No.: 15-70122-ast, NORTHPORT ENTERPRISES INC., Case No. : 15-70123-ast and VALLEY STREAM ENTERPRISES INC., Case No. : 15-70124-ast

B A C K G R O U N D

4. By Summons and Complaint filed on January 26, 2015, the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER (the "Plaintiffs"), commenced the within Adversary Proceeding (the "Plaintiffs' Adversary Proceeding"), seeking, *inter alia*, injunctive relief in connection with a sub-lease (the "Lease") entered between the Plaintiffs and the Debtor originally dated April 28, 2010 and Lease and Modification Agreement dated the ___ day of March, 2013 concerning commercial real property located at 2033 Middle Country Road, Centereach, NY 11720 (the "Demised Premises").

5. By Order of the Bankruptcy Court entered on February 18, 2015 (the "February 18 Order")the Bankruptcy Court entered an order granting a temporary restraining order (the "Temporary Restraining Order") [Docket No. 13] which required, *inter alia*, for the Plaintiffs to make all payments due and owing under the Lease to the Defendant Trustee, however, the Plaintiffs were permitted to deduct any amounts they actually paid for electric, water, and garbage disposal services and provide the Trustee with copies of all paid invoices. Annexed as **Exhibit "A"** is a true copy of the February 18 Order.

6. The Defendant filed an Answer with Counterclaims to the Plaintiffs' Adversary Proceeding dated June 24, 2015 (the "June 24 Answer").

7. The Trustee sold all of the Debtor's assets on or about June 18, 2015. Predicated upon same and by Order of the Bankruptcy Court entered on October 21, 2015 (the "October 21 Order"), the Plaintiffs' Adversary Proceeding was dismissed with prejudice as to the Defendant. However, the Counterclaims contained in Defendant's June 24 Answer were severed from the Plaintiffs' complaint and were permitted to continue as independent causes of action against the Plaintiffs. Annexed as **Exhibit "B"** is a true copy of the October 21 Order.

8. In various correspondence with Plaintiffs Counsel, Defendant alleged that the delineation of the Plaintiffs rights and responsibilities with regards the Demised Premises and rental payments due to the Defendant Trustee under the Lease were clearly and unambiguously articulated in the language contained in the February 18 Order. In the absence of receiving payment, Defendant advised Plaintiffs' Counsel it would move to hold the Plaintiffs in contempt of the February 18 Order.

9. With the exception of a payment received in March, 2015, Plaintiffs have failed to remain current by failing to make all of the required payments under the Lease for April, 2015, May, 2015 and up to and including June 18, 2015 as required by the February 18 Order.

I. CONTEMPT OF COURT

10. The February 18 Order is a lawful Order of this Bankruptcy Court. It has been established by precedent that the majority of courts to confront this issue agree that in core proceedings bankruptcy courts have civil contempt power pursuant to 11 U.S.C. §105. *In re Power Recovery Sys., Inc.,* 950 F.2d 798, 802 (1st [**9] Cir. 1991); *In re Skinner,* 917 F.2d 444, 447 (10th Cir. 1990); *In re Walters,* 868 F.2d 665, 669-70 (4th Cir. 1989); *In re Ionosphere Clubs, Inc.,* 171 Bankr. 18, 21 (S.D.N.Y. 1994) (Mukasey, J.); *In re Stockbridge Funding Corp.,* 158 Bankr. 914, 917 (S.D.N.Y. 1993) (Sprizzo, J.); *Federation of Puerto Rican Orgs. of Brownsville, Inc. v. Howe,* 157 Bankr. 206, 211 (E.D.N.Y. 1993) (Nickerson, J.); *In re Max Frankel,* 192 Bankr. 623, 629-30 (Bankr. S.D.N.Y. 1996) (listing cases).

11. Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *See Spallone v. United States,* 493 U.S. 265, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990); *Shillitani v. United States,* 384 U.S. 364, 369, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966). As the Supreme Court stated in Ex parte Robinson, 86 U.S. 505, 510, 22 L. Ed. 205 (1874), "the power to punish for contempt is inherent [**10] in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice." *See also* 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2960 (3d ed. 2006) ("A court's ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots.").

12. The power to impose civil contempt sanctions applies in Bankruptcy Court as well. It is well established that Bankruptcy Courts have power to enter civil contempt orders. *In re Chief Executive Officers Clubs, Inc*. 359 B.R. 527 (Bankr.S.D.N.Y. 2007) citing *In re Market XT Holdings Corp* Case No, 04-12078, 2006 Bankr. Lexis 3951, 2006 WL 408317 (Bankr. S.D.N.Y. 2006).(" It is well accepted, in light of the 2001 amendments to Bankruptcy Rule 9020, that Bankruptcy Courts have power to enter civil contempt orders") See also *In re World Parts, LLC* 291 B.R. 248, 253 (Bankr. W.D.N.Y. 2003)("Bankruptcy courts possess the power to impose sanctions for acts of civil contempt.") citing *In re Chauteaugay Corp*. 920 F.2d 183, 187 (2d Cir. 1990). Civil contempt is a failure to obey a court order issued for another party's benefit and such sanctions are coercive or remedial in nature. The purpose of civil contempt is to compel a reluctant party to do what a Court requires of him. *Badgley v. Santacroce* 800 F.2d 33, 36 (2d. Cir. 1986).

13. It has been established by precedent that two kinds of remedies or sanctions are available in civil contempt proceedings: (1) those that seek to compensate the victim for contempt and (2) those that seek to force prospective compliance with the Court's own order. *Weitzman v. Stein* 98 F.3d 717, 719 (2d. Cir. 1996) A district court has broad discretion in the context of contempt to fashion a coercive remedy. Remedies or sanctions that are meant to ensure future compliance may include, but are not limited to, monetary fines. See "*R" Best Product, Inc. v. 646 Corp. a/k/a Bravo Supermarket* 2002 U.S.Dist LEXIS 21134 citing *Swift v. Blum* 502 F.Supp 1140 (S.D.N.Y. 1980) see also *Berger v. Heckler* 771 F.2d. 1556, 1569 n. 18 (2d Cir 1985) stating that "in acting to bring a noncompliant party into compliance with a prior Order, the district courts adopted a variety of approaches, including the imposition of monetary fines."

14. In the case of *In re Ionosphere Clubs, Inc*. 171 B.R. 18 (S.D.N.Y. 1994), a creditor was held in contempt. The Court ordered monetary sanctions in the amount of $3,500.00, representing an estimate of the actual costs and expenses incurred by the Trustee in connection with preparing, filing and prosecuting the Motion for Contempt and monetary sanctions in an amount equal to $750.00 per day for each day that the creditor failed to withdraw his amended proofs of claim. The Court in *Ionosphere* held that the monetary sanction of $3,500.00 was in fact simply a recognized variety of a civil contempt award. Sanctions in civil contempt proceedings may be employed for "either or both of two purposes: to coerce the defendant into compliance with the Court's order, and to compensate the complainant for losses sustained. *Local 28 of the Sheet Metal Worker's Int'l Ass'n v. EEOC*, 478 U.S. 421, 443, 92 L.Ed. 2d 344, 106 S. Ct. 3019 (1986)(quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04, 91 L.Ed. 884, 67 S. Ct. 677 (1947). In *Ionosphere* ,the Bankruptcy Court stated that the $3,500.00 award was intended to compensate the Trustee for his expenses and fees that were needed to bring the creditor in compliance with the automatic stay. Those expenses and fees were an item of loss to the Trustee occasioned by the creditor's behavior. The $750 per day sanction was coercive in nature and designed to compel the creditor to stop violating the automatic stay and to desist from further violations. The Court in *Ionosphere* held that the nature of that sanction fit comfortably within the accepted goals and limits of civil contempt.

15. In the present scenario, the Trustee has no other alternative but to make the present Application to hold the Plaintiffs in contempt of the February 18 Order. Moreover, the Trustee's Counsel has incurred legal fees in the sum of $2,500.00 in connection with the drafting of the within Motion for Contempt. In addition to seeking compensation for this amount, the Trustee respectfully requests that the Court hold the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI,

and CRAIGS CAR CARE CENTER in contempt and order them to pay the Defendant/Trustee, jointly and severally, sanctions in the amount of two hundred fifty dollars ($250.00) per day for each day that they refuse to comply with the terms of the February 18 Order.

16. No prior Application has been made to this or any other Court for the relief herein requested.

WHEREFORE, the Defendant Trustee respectfully requests that his Application for the entry of an Order: (1) holding the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in contempt of court for failing to comply with an Order of the Bankruptcy Court entered on February 18, 2015 pursuant to Bankruptcy Rule 9020; (2) requesting sanctions against the Plaintiffs, TRACEY GIARDINI, CRAIG GIARDINI, and CRAIGS CAR CARE CENTER, in light of their contempt of court, in the amount of two hundred fifty dollars ($250.00) per day for each day that they refuse to comply with the terms of the February 18 Order;(3) awarding to Pryor & Mandelup, LLP, as attorneys for the Defendant, legal fees in the sum of $2,500.00 for the drafting of the within Motion for Contempt and (4) granting such other and further relief as to this Court is just and proper be granted.

Dated: Westbury, New York
July 7, 2016

PRYOR & MANDELUP, L.L.P.
Attorneys for the Defendant, Robert L. Pryor, as the Chapter 7 Trustee

By: ***s/ Michael Farina***
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